

*Bair v. Pacific Northwest Sugar Co.*, No. 02-35462

**SEP 16 2003**

B. Fletcher, Circuit Judge, dissenting:

**CATHY A. CATTERSON**  
**U.S. COURT OF APPEALS**

I respectfully dissent. In enacting 7 U.S.C. § 7284(d) Congress intended to give priority to those security interests that the CCC *properly* perfected. Here the CCC failed to follow its own regulations in the administration of the loans it made to PNSC, as well as congressional enactments intended to protect sugar growers. Were it not for these failures, the CCC would not have made the loans at issue. No “security interest” in the sugar at issue was created for the purposes of 7 U.S.C. § 7284(d), and the CCC cannot now use that provision to remedy its own deficiencies.

The authority of the CCC to make loans to entities like PNSC is not absolute. In the first instance, Congress has set forth certain requirements that must be met when the CCC makes loans to sugar processors. *See, e.g.*, 7 U.S.C. § 7272(e)(2) (2000). In addition, and perhaps more importantly in this case, Congress has given the CCC (through the Secretary of Agriculture) the authority to set further requirements in the administration of these loans. 7 U.S.C. § 7281(d) (2000). Under this authority, the CCC has issued regulations which set eligibility requirements for sugar processors seeking loans and impose a variety of other requirements on those processors once the loans are made. 7 C.F.R. §§ 1435.104 -

1435.106 (2001).<sup>1</sup> One of these regulations requires that

If there are any liens or encumbrances on sugar pledged as collateral for a loan, the processor must obtain waivers that fully protect CCC's interest even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the sugar after loan approval.

7 C.F.R. § 1435.105(b) (2001). The regulations also provide that “[n]o loan proceeds may be disbursed until the sugar has actually been processed *and is otherwise established as being eligible to be pledged as loan collateral.*” 7 C.F.R. § 1435.105(c) (2001) (emphasis added).

In this case, the CCC failed to obtain any lien waivers from the sugar growers, as required by 7 C.F.R. § 1435.105(b). The district court dismissed this issue by pointing to the language of § 1435.105(b), which mandates that the processor, not the CCC obtain the lien waivers. But while the literal language of that regulation places requirements on the processor, it is the CCC’s responsibility to ensure that the regulations under which it operates the sugar loan program are followed. That responsibility is made clear by the next section of the regulation, which specifies that no loan proceeds may be disbursed until the sugar is

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<sup>1</sup> While there was some dispute as to when the CCC loans to PNSC were actually made, the district court below assumed for purposes of its decision that all of the loans had been made between December 4, 2000 and January 16, 2001. The pertinent regulations are therefore those in effect during that time period, even though these sections have since changed.

“established as being eligible to be pledged as loan collateral.” 7 C.F.R. § 1435.105(c) (2001). That section places an affirmative obligation on the CCC to ensure that the waivers are obtained *before* the loans are disbursed. In the instant case, the PNSC never obtained the appropriate waivers from the growers, and the sugar was therefore never eligible as collateral. It then follows that, pursuant to its own regulations, the CCC should not have disbursed the loan proceeds in the first place.

Under the majority’s reading of 7 U.S.C. § 7284(d), none of this matters, however, since any liens obtained by the CCC, whether properly or not, would have priority over all others. Congress meant to protect the CCC’s liens only when they had been properly perfected. This is consistent with the language in 7 U.S.C. § 7284(d) and that of the CCC’s regulations. If, as the majority asserts, § 7284(d) gives priority to the CCC’s liens over any and all other liens on sugar, then there is no reason for the requirement in 7 C.F.R. § 1435.105(b) that the CCC obtain waivers to “fully protect” its interest. The CCC’s interest would already be completely protected by § 7284(d) under the majority’s reading.<sup>2</sup> Instead, there is

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<sup>2</sup> It should be noted that the regulations discussed here were finalized by the Department of Agriculture several months after Congress had enacted § 7284(d). *Compare* Implementations of the Farm Program Provisions of the 1996 Farm Bill, 61 Fed Reg. 37,544, 37,618 (July 18, 1996) *with* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (enacted April 4,

a dual purpose for the regulation: first, as its own language indicates, it is meant to protect the CCC's interest in case of litigation such as the instant one; but, more importantly, the regulation serves to give notice to growers and other lien holders that, by operation of 7 U.S.C. § 7284(d), their liens are to be subordinated to those of the CCC.<sup>3</sup> The agency's interpretation is reasonable and consistent with congressional intent. We should defer to it.

The CCC's failure to ensure that waivers had been obtained from prior lienholders was not its only deficiency in this case. 7 U.S.C. § 7272(e)(2) requires the CCC to obtain "such assurances as the Secretary considers adequate" to ensure that processors would provide payments to producers that are proportional to the value of the loan received by the processor for the sugar in question. In this case, the CCC contends, in essence, that it was taking PNSC's word that it would make such payments to sugar growers. Appellee Br. at 18-19. While the statute does give the CCC substantial leeway in determining what assurances are adequate,

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1996).

<sup>3</sup> This analysis also explains the CCC's statements in its "Notification of CCC's Security Interest." That document states that "[i]n the event that CCC has failed to obtain a lien waiver from a superior lienholder," it will be subject to that lien if "the lien is established to be legally superior to CCC's interest." Under the majority's reading of 7 U.S.C. § 7284(d), it would appear that no lien could ever be established as legally superior to that of the CCC.

surely Congress did not intend to let the CCC simply take processors' word that it would make such payments. Some minimum level of oversight appears to be intended by this provision, and the CCC appears to have failed the sugar growers in this additional way.

In the end, CCC seeks § 7284(d)'s protection for loans that it should not have made in the first place since it never ensured that the proper waivers had been obtained. Congress certainly meant § 7284(d) to give priority to CCC's security interests, but only to give such protection when the CCC was administering the loan program properly. Since the sugar at issue here was never eligible as collateral in the first place, I would hold that the CCC never gained a "security interest" in that sugar, and that the CCC's "liens" at issue here are therefore not protected by §7284(d).